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No. 234

In the Supreme Court of the United States

OCTOBER TERM, 1960

ENRIQUE ESTEBAN GANDUXE Y MARINO,
PETITIONER

v.

P. A. ESPERDY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE FOR THE NEW YORK DISTRICT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 24-25) is reported at 278 F. 2d 330. The opinion of the district court (Pet. App. 17-22) is reported at 183 F. Supp. 565.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1960 (C.A.R. 10a).[1] The petition for

[1] "C.A.R." refers to the printed court of appeals' record numbered from 1a through 12a.

a writ of certiorari was filed on July 9, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's misrepresentation, in applying for an entry visa, that he had never been arrested or convicted of a criminal offense was wilful and material so as to warrant his deportation as an excludable alien under Section 212(a)(19) of the Immigration and Nationality Act of 1952.

2. Whether the deportation hearing was unfair because timely notice was given by registered mail instead of being included in the order to show cause as provided by the regulations.

3. Whether the deportation hearing was rendered unfair by the receipt in evidence, without opportunity to cross-examine the affiants, of *ex parte* affidavits of government witnesses as to their general practice in making inquiry of visa applicants regarding prior arrests and convictions.

STATUTES INVOLVED

Section 212 of the Immigration and Nationality Act of 1952 (66 Stat. 182; 8 U.S.C. 1182) provides in pertinent part:

> (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * * *

(4) Aliens afflicted with psychopathic personality * * *

* * * *

(19) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States by fraud, or by willfully misrepresenting a material fact;

* * * *

Section 241 of the Immigration and Nationality Act of 1952 (66 Stat. 204; 8 U.S.C. 1251) provides in pertinent part:

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;

* * * * *

Section 722 of the New York Penal Law, McKinney's Consolidated Laws of New York, provides in pertinent part:

Disorderly conduct.

Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:

* * * *

(8) Frequents or loiters about any public place soliciting men for the purpose of committing a crime against nature or other lewdness;

* * * *

STATEMENT

Petitioner, a native and citizen of Cuba, instituted an action in the United States District Court for the Southern District of New York to invalidate an order for his voluntary departure or deportation. The complaint alleged that the administrative proceedings which led to the deportation order had not been conducted in accordance with Section 242(b) of the Immigration and Nationality Act and the regulations thereunder, and attacked the ruling that petitioner was deportable under Section 241(a)(1) of the Act (*supra*, p. 3), as an alien excludable at the time of admission into the United States, by Section 212(2)(19) of the Act (*supra*, pp. 2-3) for having procured a visa by wilfully misrepresenting a material fact (R. 1-4). Respondent filed a cross-motion for summary judgment to dismiss the complaint (R. 18-20). The district court upheld the deportation order and granted respondent's motion for summary judgment dismissing the complaint (R. 23-29; Pet. App. 17-22). On appeal, the court of appeals affirmed *per curiam*, on the district court's opinion (Pet. App. 24-25).

Evidence adduced at the administrative proceedings may be summarized as follows:

Petitioner is a 31-year-old male alien born in Cuba, who last entered the United States at Tampa, Florida, on November 28, 1955 (A, p. 3; Ex. 6).[2]

[2] "A" refers to the administrative record in the deportation proceedings contained in the Immigration and Naturalization Service file, a copy of which we are filing with the Clerk of this Court.

On November 15, 1956, he signed a sworn written statement which he made voluntarily in an interview with an officer of the Immigration and Naturalization Service (A, Ex. 7). In this statement petitioner, when confronted with a photostatic copy of a record of his conviction, admitted that on November 14, 1953, he had been arrested in New York City and convicted in the Magistrates' Court, upon his plea of guilty, of the offense of disorderly conduct, for which he had been fined $25. Petitioner also stated that, when he entered the United States for permanent residence in 1955, he had been in possession of an immigrant visa issued on November 23, 1955, by the American vice consul at Havana, Cuba; that when he applied for the visa he had been placed under oath to tell the truth; and that he answered "never" to question 32 in the visa application, thus asserting "I have never been: Arrested; convicted; * * *." He said he thought that the question referred only to his record in Cuba as the country of his birth and citizenship (A, Ex. 7, Ex. 6).

On November 16, 1956, the day after petitioner executed this statement, the Service started deportation proceedings by an order to show cause. This order charged that petitioner was subject to deportation under Section 241(a)(1) of the Act, on the ground that at the time of his entry in 1955 he was excludable from admission to the United States, under Section 212(a)(19), as an alien who had procured a visa by fraud or by wilfully misrepresenting a material fact (A, Ex. 1). The Service notified petitioner by registered mail on November 23, 1956,

that a hearing would be held on the order to show cause at 8:45 a.m., on December 4, 1956, at 70 Columbus Avenue in New York City (A, Ex. 3).

At the deportation hearing, petitioner, who was represented by counsel and assisted by a Spanish interpreter, testified that he had been arrested in New York City on November 14, 1953 (A, pp. 3, 4, 6). A certified copy of the record of his conviction (A, Ex. 4), showing that he had pleaded guilty on November 14, 1953, to disorderly conduct under Section 722(8) of the New York Penal Law (*supra*, p. 3) (relating to solicitation of men "for the purpose of committing a crime against nature or other lewdness"), and his signed statement on November 15, 1956 (A, Ex. 7), were received in evidence over his objection (A, pp. 6-8, 10-11). Petitioner's visa application (A, Ex. 6) was also received in evidence (A, p. 9).

Petitioner testified at the hearing that he had not read question 32 of the visa application (inquiring about prior arrests and convictions) when he submitted his application, and that no one at the American Consulate in Havana had read it to him. He claimed that the word "never" must have been inserted by the clerk at the Consulate who had typed his application, without his knowledge, and that, if he had been asked whether he had ever been arrested or convicted in the United States, he would have answered "Yes" (A, pp. 16-19).

On December 4, 1956, the special inquiry officer found that petitioner's statement in his application for a visa that he had never been arrested or con-

victed of a criminal offense was wilfully false, and that the visa had been procured by fraud or by misrepresenting a material fact. Accordingly, the petitioner was ordered deported. On May 1, 1957, the Board of Immigration Appeals ordered the hearing reopened for the purpose of receiving additional evidence on the question of petitioner's wilful misrepresentation as to previous arrests or convictions.

At the reopened hearing a certified copy of petitioner's preliminary sworn questionnaire for a visa application was received in evidence over objection (A, Ex. R.-1, pp. R.-2, R.-3). In this questionnaire, in answer to a question which called for all places of residence of over six months, petitioner stated that he had always resided at Havana except on October 12, 1960, June 5, 1951, January 6, 1952, and May 9, 1953, when he visited the United States, and that he had never been "detained" or "tried". Petitioner admitted that he had resided in the United States for periods of more than six months after January 6, 1952, and May 9, 1953 (A, pp. R.-6, R.-7). He said that he had not read the questionnaire, that he had given it to his lawyer who filled it out, and that he had signed it (A, p. R.-4). Petitioner testified, in accordance with his testimony at the original hearing, that when he was issued his immigration visa (A, Ex. 6) no one at the American Consulate asked him whether he had ever been arrested (A, p. R.-10). Over petitioner's objection that he was deprived of the right of cross-examination or to take depositions of the affiants, affidavits of the vice consul and of the clerk who had typed petitioner's applica-

tion (A, Ex. R.-2) were received in evidence, declaring that it was the practice of the Consulate and of the clerk to question every applicant for a visa as to previous arrests. The special inquiry officer ruled that he would consider only the portions of the affidavits which described the general procedure followed by the American Consulate at Havana (A, pp. R.-10, R.-11). A letter from a psychiatrist was offered by petitioner and received in evidence, stating in part that petitioner "is not suffering from a psychopathic disorder, nor is he affected by overt homosexuality" (A, Ex. R.-3, pp. R.-14—R.-15).

After reviewing the record, the special inquiry officer adhered to his original decision, concluding that petitioner was subject to deportation under Section 241(a)(1) and Section 212(a)(19) of the Act, and ordered that he be deported if he failed to make a voluntary departure at his own expense in lieu of deportation (p. 6, special inquiry officer's decision of February 10, 1958). An appeal from this order was dismissed by the Board of Immigration Appeals (p. 8, Board opinion of July 8, 1958).

ARGUMENT

1. Contrary to petitioner's contention (Pet. 8-12), his wilful misrepresentation of a material fact in applying for the visa which he successfully obtained is an adequate ground for deportation. His deportation is based upon his procuring the visa by concealment of the material fact of his conviction of disorderly conduct in soliciting men for homosexual purposes, rather than upon the mere fact of the con-

viction (even though it involved moral turpitude). Under Section 241(a)(1) of the Immigration and Nationality Act, petitioner was deportable under Section 212(a)(19) (*supra*, pp. 2-3) as an alien who had procured a visa by "willfully misrepresenting a material fact."

The misrepresentation was wilful. In his voluntary statement of November 15, 1956, petitioner admitted his conviction, but stated that, when he answered question 32 of the visa application that he had "never" been convicted or arrested, he thought this question referred only to his record in Cuba (A, Ex. 7). There was nothing, however, on the face of the application to show that the question was limited to an applicant's record in the country of his birth (A, Ex. 6). At the deportation hearing, petitioner changed to the inconsistent story that he had not read or had this question read to him, and that the word "never" must have been inserted by the typist clerk at the Consulate without his knowledge (A, pp. 16-19). This change in story and the evidence adduced at the reopened hearing as to his misleading answers regarding his residence in the United States (see the Statement, *supra*, pp. 5-7) support the conclusion of the special inquiry officer that the misrepresentation was wilful.

The misrepresentation was also made in relation to a material fact. If petitioner had told the consular authorities of his conviction for homosexual solicitation it is almost certain that a further investigation would have been made before granting the visa, and it is very probable that an attempt

would have been made to exclude him under Section 212(a)(4) of the Act as an alien "afflicted with psychopathic personality * * *."[3] The general rule is that a misrepresentation is material if upon further investigation (cut off by the misrepresentation) the truth might well have resulted in denial of the alien's admissibility. *United States ex rel. Jankowski* v. *Shaughnessy*, 186 F. 2d 580 (C.A. 2); *United States* v. *Flores-Rodriguez*, 237 F. 2d 405 (C.A. 2); *Landon* v. *Clarke*, 239 F. 2d 631 (C.A. 1); *United States* v. *Montalbano*, 236 F. 2d 757 (C.A. 3), certiorari denied *sub nom. Genovese* v. *United States*, 352 U.S. 952; *Duran-Garcia* v. *Neelly*, 246 F. 2d 287 (C.A. 5); *Corrado* v. *United States*, 227 F. 2d 780 (C.A. 6), certiorari denied, 315 U.S. 925; *Chaunt* v. *United States*, 270 F. 2d 179 (C.A. 9), pending on certiorari, No. 22, this Term; *Torres* v. *Hoy*, 269 F. 2d 289 (C.A. 9); *Ablett* v. *Brownell*, 240 F. 2d 625 (C.A. D.C.).

The Seventh Circuit has held that a false state-

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[3] See Senate Report No. 1137, 82d Cong., 2d Sess. (1952) at p. 9: "Existing law does not specifically provide for the exclusion of homosexuals and sex perverts. * * * The Public Health Service has advised that the provision for the exclusion of aliens afflicted with psychopathic personality or a mental defect which appears in the instant bill is sufficiently broad to provide for the exclusion of homosexuals and sex perverts. * * * *"

[4] *In re Field's Petition*, 159 F. Supp. 144 (S.D.N.Y.), held that the nondisclosure of the alien's previous residence in Russia was not material, so that she was eligible for naturalization. It did, however, imply that, if the Service had shown that a true statement would have resulted in an investigation which might have led to a refusal of the visa, the decision would have been otherwise.

ment by the alien is not material if it conclusively appears—from the alien's proof or by admission of the government—that the application would still have been granted had the true facts been given. *United States ex rel. Leibowitz* v. *Schlotfeldt*, 94 F. 2d 263 (C.A. 7); *Calvillo* v. *Robinson*, 271 F. 2d 249 (C.A. 7).* These rulings do not apply here. It is very far from certain on this record that petitioner's visa would have been granted if he had told the truth about his conviction. Disclosure might very well have led to medical and other investigation on behalf of the Service, which would have confirmed petitioner's homosexuality and inadmissibility. Certainly, the existence of the morals conviction would at least have led to further inquiry, the results of which cannot be known. Petitioner's rather thin evidence (at the deportation hearing) that despite the conviction he did not engage in homosexual conduct cannot be said to be so overwhelming that it is clear (as it was in *Leibowitz* and *Calvillo*) that the visa would have been granted even if he had revealed the conviction. And since the deportation was based upon the false representation and not upon his homosexuality, the Service was under no burden to rebut petitioner's evidence that he was not a homosexual—at least until

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* Some of the language in the *Calvillo* opinion may be read as saying that, to be material, the misrepresentation must relate to a fact which would, in itself, have justified the denial of a visa; but the actual holding of the case is that (a) it affirmatively appeared, without serious contradiction by the government, that the alien would have been admitted even though the truth had been disclosed, and (b) in that state of the record the misrepresentation could not be said to be material.

that evidence became so strong (which it did not in petitioner's case) that it proved conclusively that the misrepresentation could have had no effect whatever:

Congress considers the question of arrests and convictions material, since Section 222(a) (8 U.S.C. 1202(a), specifically requires every visa applicant to state in his application "whether he was ever arrested, convicted or was ever in prison * * *." The government should not be cut off from its right to an honest answer regarding previous criminal arrests and convictions leading to further investigation, which might well result in denial of the alien's admissibility. A false statement by an alien which eliminates the possibility of such an investigation—as was the situation here—is normally a wilful misrepresentation of a material fact justifying deportation.

2. Petitioner's deportation hearing was not unfair by reason of the procedural irregularity in the giving of notice as to the time and place of the hearing (see Pet. 12-13). Cf. *Bilokumsky* v. *Tod*, 263 U.S. 149. While this notice was omitted from the order to show cause served on November 16, 1956 (A, Ex. 1), on November 23 the Service notified petitioner by registered mail of the time and place of the hearing to be held on December 4, 1956 (A, Ex. 3). Petitioner thus received more than the seven days' notice prescribed by the regulations, and such notification conformed to the "reasonable" notice required by Section 242(b) of the Act. The record shows, moreover, that an offer was made to petitioner for additional time to prepare his case, but

counsel stated that petitioner did "not require [more] time for preparation" (A, pp. 2-3). Consequently, it is clear that petitioner suffered no prejudice from this minor irregularity.

3. Petitioner contends that the deportation hearing was unfair since he was denied an opportunity to cross-examine or take the depositions of the vice consul and the clerk typist (Pet. 13-15). Their affidavits to the effect that it was the general practice of the Consulate and of the clerk to question every applicant for a visa as to previous arrests (A, Ex. R.-2) were received in the reopened hearing, after petitioner had repeated his previous testimony that no one at the Consulate had asked him whether or not he had ever been arrested (A, p. R.-10).

Petitioner's argument overlooks the fact that in his statement on November 15, 1956 (A, Ex. 7), he himself admitted that he had answered on his visa application that he had never been arrested or convicted (see, *supra*, p. 5). Moreover, the affidavits of the vice consul and typist were received and considered by the special inquiry officer only for the limited purpose of proof of the procedure usually followed by the Consulate at Havana (A, p. R.-11; pp. 3-4, special inquiry officer's decision of February 10, 1958). Receipt of these affidavits for that limited purpose did not render the deportation hearing unfair. Cf. *George* v. *United States*, 68 F. 2d 513 (C.A. 5), certiorari denied, 292 U.S. 634; *Cahan* v. *Carr*, 47 F. 2d 604 (C.A. 9), certiorari denied, 283 U.S. 862. There is no showing, and no reason to believe, that petitioner was precluded from attempt-

ing to show, if he had so desired, that the usual procedure followed by the Consulate with regard to inquiries about previous arrests and convictions was not always carried out (see A, pp. R.-11, R.-12).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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